LIM SOH WAH & ANOR

v.

WONG SIN CHONG & ANOR & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: D-02-390-1997]
14 MARCH 2001

TORT: *Negligence - Professional negligence - Causation - Whether established - Counsel failed to appear at hearing and also failed to inform client of hearing date - Judgment entered against client - Application to set aside judgment dismissed as defence disclosed no triable issues - Whether client had a claim in negligence against counsel - Whether counsel's negligence made no difference to client's case in view of no triable issues*

LEGAL PROFESSION: *Duty of care - Failure to appear at hearing and also to inform client of hearing date - Judgment entered against client - Application to set aside judgment dismissed as defence disclosed no triable issues - Whether client had a claim in negligence against counsel - Whether counsel's negligence made no difference to client's case in view of no triable issues - Whether counsel failed to discharge a fundamental duty to client*

There were two appeals and related cross-appeals before the court. Both appeals were in relation to professional negligence on the part of the appellant counsels for the respondents.

The issues were: (i) whether the appellant's failure to appear at the court's hearing and to inform the respondents of the hearing date, as a result of which judgment was entered against the respondents, gave rise to a claim in negligence; and (ii) whether as the application to set aside the said judgment was dismissed on the ground that the defence raised no triable issues, the appellant's negligence would have made no difference to the respondent's case; and (iii) whether causation was established.

Held:

Per Gopal Sri Ram JCA

[1] By the appellant's failure to inform the respondents of the hearing date, the respondents lost an opportunity to convince the judge by way of oral testimony and documentary evidence that they had a complete answer to the claim that had been brought against them. In fact the respondents were able to demonstrate to a conviction that the appellant had not prepared

the respondents' case with the care and attention it deserved. Vital links in the evidence were omitted by a singular failure to pursue the proper line of inquiry, especially in regard to the relevant documentary evidence.

[2] Advocates and solicitors undertake an onerous task when they agree to act for a client. There is an assumption of responsibility by the advocate and solicitor coupled with reliance by the client on the skill of the advocate and solicitor. The advocate and solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law of tort.

[3] One of the fundamental duties of an advocate and solicitor is to diarize his cases, keep his client informed of the diarized dates and prepare the case with the client. This was a case where there was a failure to discharge that rather fundamental obligation, as a result of which the respondents suffered. Therefore, the causative link between the negligent omission and the damage was established.

[Appeals dismissed; cross-appeals allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Terdapat dua rayuan dan rayuan bersaling yang berkaitan di hadapan mahkamah. Kedua-dua rayuan adalah berhubung dengan kecuaian profesional di pihak peguam-peguam bagi pihak responden.

Isu-isu adalah: (i) samada kegagalan perayu untuk menghadiri pembicaraan mahkamah dan memaklumkan responden-responden mengenai tarikh pembicaraan tersebut yang mengakibatkan penghakiman dimasukkan terhadap responden-responden, membangkitkan suatu tuntutan kecuaian; (ii) samada disebabkan permohonan untuk mengenepikan penghakiman tersebut gagal atas alasan bahawa pembelaan tidak mempunyai isu-isu yang boleh dibicarakan, kecuaian perayu tidak memberi sebarang perbezaan kepada kes responden-responden; dan (iii) samada kausa telah ditetapkan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Dengan kegagalan perayu untuk memaklumkan responden-responden mengenai tarikh perbicaraan, responden-responden kehilangan peluang untuk menyakinkan hakim melalui testimoni lisan dan keterangan dokumentar bahawa mereka mempunyai jawapan yang lengkap kepada tuntutan yang telah di bawa terhadap mereka. Malahan responden-responden dapat menunjukkan satu pensabitan bahawa perayu telah tidak menyediakan kes responden-responden dengan penuh hemat serta perhatian

yang patut diberikan. Hubungan penting dalam keterangan telah tertinggal oleh kerana satu-satunya kegagalan untuk meneruskan penyiasatan yang sempurna, khasnya berhubung dengan keterangan dokumentar.

[2] Peguambela dan peguamcara memikul kerja yang berat bila mereka bersetuju untuk mewakili anakguaman. Diandaikan bahawa peguambela dan peguamcara bertanggungjawab dan anakguaman bergantung kepada kemahiran peguambela dan peguamcara. Tugas peguambela dan peguamcara untuk memberikan perhatian dan menggunakan kemahiran yang munasabah ditetapkan oleh kontrak dan undang-undang tort.

[3] Salah satu tugas penting seorang peguambela dan peguamcara ialah mencatatkan dalam diari kes-kes beliau, memberitahu anakguamannya mengenai tarikh-tarikh yang dicatatkan dalam diari itu dan menyediakan kes tersebut bersama anakguamannya. Ini adalah kes di mana berlakunya kegagalan untuk melaksanakan kewajipan yang agak penting itu, dimana responden-responden menerima akibatnya. Oleh itu perhubungan kausa antara kecuaian dan kerugian telah diwujudkan.

[Rayuan-rayuan ditolak; rayuan bersilang telah dibenarkan.]

Cases referred to:

Ali Jais v. Linton Albert & Anor [1999] 4 CLJ 167 ***(refd)***
Arthur (JS) Hall & Co v. Simons [1999] 3 WLR 873 ***(refd)***
Barnett v. Chelsea & Kensington Hospital Management Committee [1968] 1 All ER 1068 ***(refd)***
Henderson & Ors v. Merrett Syndicates Ltd & Ors [1994] 3 All ER 506 ***(foll)***
Hunter v. Chief Constable of West Midlands & Anor [1981] 3 All ER 727 ***(refd)***
Osman v. The UK [2000] EHRR 245 ***(refd)***
Miranda v. Khoo Yew Boon [1968] 1 MLJ 161 ***(refd)***
McGhee v. National Coal Board [1972] 3 All ER 1008 ***(refd)***
Rondel v. Worsley [1969] 1 AC 191 ***(refd)***
Wilsher v. Essex Area Health Authority [1988] 1 All ER 860 ***(refd)***

Civil Appeal No: D-02-390-1997
For the 1st appellant - Arun Krishnalingam; M/s Shearn Delamore & Co
For the 2nd appellant - Bhagwan Singh; Bhagwan Singh & Ridzuan
For the respondents - Mike Wrigglesworth; M/s Wrigglesworth & Co

Civil Appeal No: D-02-619-1996
For the 1st appellant - Bhagwan Singh; M/s Bhagwan Singh & Ridzuan
For the 2nd appellant - Arun Krishnalingam; M/s Shearn Delamore & Co
For the respondents - Mike Wrigglesworth; M/s Wrigglesworth & Co

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This appeal has to do with causation in the law of negligence in tort. It arises in the context of professional negligence on the part of an advocate and solicitor. It comes at a time when the subject is in vogue. In England, for example, the courts have, influenced no doubt by the far-reaching decision of the European Court of Human Rights in *Osman v. The U.K.* [2000] E.H.R.R. 245 removed the blanket immunity enjoyed by advocates since the policy decision in *Rondel v. Worsley* [1969] 1 AC 191. See, *Arthur (JS) Hall & Co. v. Simons* [1999] 3 WLR 873. Our law has, however, always differed from English law. Advocates here have never enjoyed immunity from suits for negligence. See, *Miranda v. Khoo Yew Boon* [1968] 1 MLJ 161; *Ali bin Jais v. Linton Albert & Anor* [1999] 4 CLJ 167. This may cause difficulties especially in criminal cases where there is a danger of the merits of a conviction being re-litigated in civil proceedings. Perhaps the correct policy approach in such cases lies in the court's power to strike an action out as an abuse of process. See, *Hunter v. Chief Constable of West Midlands & Anor* [1981] 3 All ER 727.

But the present appeal does not involve any wider policy question. It is a case in which the appellant advocate delivered a defence but failed to appear in court on the day fixed for the trial of the action. He also did not inform his clients (the respondents) of the trial date. Judgment was then entered against the respondents. An application to set aside the judgment failed before Mohamed Zahir J, *inter alia*, on the ground that the defence raised no triable issue. A subsequent appeal also failed. The advocate has seized upon the finding made by Mohamed Zahir J. His counsel argued that even if the advocate had informed the respondents and they all had been present at the date of hearing it would have made no difference to the respondents' case. It would have been lost anyway. So it all goes back to causation.

A plaintiff may suffer damage. But it is of no consequence unless the defendant negligently caused it. If the damage would have happened anyway, then the defendant cannot be held liable for it. For liability to be visited upon a defendant's head, it must be proved that but for his negligence the harm would not have happened. See, *Barnett v. Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068. But, the inferences to be drawn from any given set of circumstances may establish causation. The point is well illustrated by *McGhee v. National Coal Board* [1972] 3 All ER 1008.

In that case, the pursuer worked in a brick kiln. The hot and dusty conditions of his work place caused the brick dust to adhere to his sweaty skin. No breach of duty by his employers, the defenders, was established in respect of his working conditions. However, the employers were held to be at fault in failing to provide adequate washing facilities which resulted in the pursuer having to cycle home after work with his body still caked in brick dust. The pursuer contracted dermatitis and the evidence that this was caused by the brick dust was accepted. Brick dust adhering to the skin was a recognised cause of industrial dermatitis and the provision of showers to remove it after work was a usual precaution to minimise the risk of the disease. The precise mechanism of causation of the disease however, was not known and the furthest the doctors called for the pursuer were able to go was to say that the provision of showers would have materially reduced the risk of dermatitis. They were unable to say that it would probably have prevented the disease.

The pursuer failed before the Lord Ordinary and the First Division of the Court of Session on the ground that he had not proved causation. On further appeal, the House of Lords reversed. Lord Wilberforce said (at p. 1012):

> But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail – a logic which dictated the judgments below. The question is whether we should be satisfied in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is a sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk who, ex hypothesi, must be taken to have foreseen the possibility of damage, who should bear its consequences.

But this dictum of Lord Wilberforce should not be taken too far. It is not an inflexible rule of law. It merely reflects the approach that commended itself to the court on the state of the evidence that existed in that particular case. That much was made clear by Lord Bridge in *Wilsher v. Essex Area Health Authority* [1988] 1 All ER 860. After citing the passage in Lord Wilberforce's speech quoted above, Lord Bridge said (at p. 881):

> The conclusion I draw from these passages is that *McGhee v. National Coal Board* laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

That returns us to the present appeal. Now, we must confess that despite the careful argument presented by counsel for the appellant, we formed the view that causation had been established. As pointed out by counsel for the respondents, this is a case where the clients lost an opportunity to convince the judge by way of oral testimony and documentary evidence that they had a complete answer to the claim that had been brought against them. In fact, Dato' Wrigglesworth was able to demonstrate to a conviction that the appellant had not prepared his clients' case with the care and attention it deserved. Vital links in the evidence were omitted by a singular failure to pursue the proper line of inquiry, especially in regard to the relevant documentary evidence. If the appellant solicitor had informed the respondents of the hearing date and had prepared himself properly for the trial, he would have been able to persuade the judge that they had a complete answer to the claim that had been brought against the respondents. Accordingly, this is a case where the respondents lost a valuable right – the right to persuade a judge of first instance by way of oral and documentary evidence – by reason of the appellant's oversight of the notice of hearing that had been given by the court. It is an unfortunate turn of events which we are certain the solicitor did not wish upon his clients. But it happened. And for that the solicitor must answer in a claim for negligence.

Advocates and solicitors undertake an onerous task when they agree to act for a client. There is an assumption of responsibility by the solicitor coupled with reliance by the client on the skill of the solicitor. The solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law

of tort. Here, we need do no more than quote the words of Lord Goff in *Henderson & Ors. v. Merrett Syndicates Ltd. & Ors.* [1994] 3 All ER 506, 530:

> The judgment of Oliver J in *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571, [1979] Ch 384 provided the first analysis in depth of the question of concurrent liability in tort and contract. Following upon *Esso Petroleum Co Ltd v. Mardon* [1976] 2 All ER 5; [1976] QB 801, it also broke the mould, in the sense that it undermined the view which was becoming settled that, where there is an alternative liability in tort, the claimant must pursue his remedy in contract alone. The development of the case law in other common law countries is very striking. In the same year as the *Midland Bank Trust* case, the Irish Supreme Court held that solicitors owed to their clients concurrent duties in contract and tort: see *Finlay v. Murtagh* [1979] IR 249. Next, in *Central Trust Co v. Rafuse* [1986] 31 DLR (4th) 481 Le Dain J, delivering the judgment of the Supreme Court of Canada, conducted a comprehensive and most impressive survey of the relevant English and Canadian authorities on the liability of solicitors to their clients for negligence, in contract and in tort, in the course of which he paid a generous tribute to the analysis of Oliver J in the *Midland Bank Trust* case. His conclusions are set out in a series of propositions (at 521–522); but his general conclusion was to the same effect as that reached by Oliver J. He said (at 522):
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> > A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.
>
> I respectfully agree.

One of the fundamental duties of a solicitor is to diarize his cases, keep his client informed of the diarized dates and prepare the case with the client. The present instance is a case where there was a failure to discharge this rather fundamental obligation. As a result the clients suffered. There it is then – the causative link – between the negligent omission and the damage.

Having come to the conclusion that there are no merits in the appeal, we turn to consider the cross-appeal. This concerns the failure of the judge to allow the respondents certain items of damage that had been clearly proved by them at the trial. There was no serious dispute about these items and the cross appeal was not seriously resisted. Accordingly, we allowed the cross appeal.

Before concluding, there are two matters requiring special mention. The first point is this. In the present appeal, we found ourselves at a disadvantaged position simply because the trial judge did not write any grounds of judgment. It was not a difficult case. There is therefore really no reason for the trial judge depriving us of the benefit of his views. Ordinarily we would have declined to hear the appeal in the absence of grounds of judgment. But the present appeal is an old matter and it was in the interests of justice that it be disposed of without further delay.

One last point. There is another appeal connected with the present. It is D-02-619-96. That is an appeal by the other partner of the firm of solicitors charged with negligence. But there was some serious defect about it. A motion to put matters right had been refused by a differently constituted division of this court. As such there was no appeal properly before us. We accordingly dismissed that appeal. But the identical cross appeal was lodged there as well. The orders we made on these appeals were therefore as follows. The instant appeal (D-02-390-97) was dismissed. So was appeal D-02-619-96. The cross appeal in both appeals was allowed and judgment in terms of the cross appeal was entered for the respondents in both appeals. All costs incurred in this court were awarded to the respondents. All other orders made by the court below were affirmed. The deposit in court was ordered to be paid out to the respondents to account of their taxed costs.